

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:LM:FSH: [REDACTED] POSTF-108992-02  
[REDACTED]

date: March 1, 2002

to: [REDACTED] Revenue Agent (LMSB)

from: [REDACTED], Attorney  
Associate Area Counsel, CC:LM:FS: [REDACTED]

subject: [REDACTED], L.P.  
**Preparation of Restricted Consent**

This memorandum is in response to your request dated February 15, 2002, concerning the above-referenced matter. Specifically, you are requesting our preparation of language in a restricted consent on Form 872-P for [REDACTED] L.P.

**FACTS**

The taxpayer is under examination for its [REDACTED] taxable year. This examination came about through the examination of [REDACTED]. A brief recitation of the facts leading up to your request are set forth below.

[REDACTED] and [REDACTED] Independent Power Producers (IPPs) agreed to terminate or restructure their Purchase Power Agreements (PPA). The buyout was consummated in [REDACTED] as follows:

1. [REDACTED] paid \$[REDACTED] in cash plus [REDACTED] shares ([REDACTED]%) of its outstanding stock.
2. Some of the IPPs elected to take cash in lieu of stock. This amounted to \$[REDACTED] in additional cash.
3. The FMV of the [REDACTED] shares of stock issued was \$[REDACTED]
4. [REDACTED] deducted \$[REDACTED] on their [REDACTED] federal tax return pertaining to the buyout. They had obtained PLR's from the Internal Revenue Service allowing them to deduct payments made to terminate the PPAs.
5. [REDACTED] is amortizing the \$[REDACTED] over [REDACTED] years for book purposes.

The IPPs formed a consortium which handled much of the negotiations with [REDACTED]. More importantly, it handled the distribution of the proceeds to the [REDACTED] entities. Per [REDACTED] neither [REDACTED] or any of the IPPs knew how much any individual IPP received. This was to insure that the deal would go smoothly, and to limit the bickering among the IPPs.

[REDACTED] wire transferred [REDACTED] payments into a bank account in it's name at the [REDACTED] in [REDACTED]. The funds were immediately transferred to a bank account in the same bank in the name of the consortium. Funds were distributed by [REDACTED] attorneys from the account, to the IPPs or payments were made to third parties on the IPP's behalf.

Each of the IPPs received at least two PLRs, the first allowing them to treat the transaction as the sale of a capital asset and the second allowing them to elect to treat the transaction as an involuntary conversion.

You have attempted to obtain [REDACTED] tax returns and transcripts of the [REDACTED] IPPs to determine the amount reported on the transaction, and whether an election to defer the gain was made. A substantial amount of the proceeds has been accounted for on the tax returns. However, while most of the entities have elected to defer the gain on the original tax return, [REDACTED] others have reported the entire gain on the original return. [REDACTED] is one of the [REDACTED].

[REDACTED] is being examined in order to ascertain if the gain was accurately reported on the termination of the power contract, and whether the proceeds from the sale of the power generating facility were converted into "similar property" for the purpose of I.R.C. § 1033.

Accordingly, you are requesting a restricted consent since you have determined that due to time constraints, the only credible items concern the proceeds received by the taxpayer from [REDACTED] for the termination of the power contracts as set forth in Schedule D and the sale of the power generating facility, as set forth in the Form 4797 of the [REDACTED] Form 1065.

This is significant since I.R.M. § 4541.71(2) provides, as a general rule, that restricted consents should not be used where there are more than two issues (not including the "consequential changes" referred to in I.R.M. § 4541.72(3) that must be held open.

I.R.M. § 4541.72(1) cautions that extreme care should be taken in drafting restrictive language in a consent. The restriction should not foreclose the use of an alternative rationale in making the proposed adjustment if such becomes necessary. Similarly, Rev. Proc. 68-31, 1968-2 C.B. 917, as modified by Rev. Proc. 77-6, 1988-1 C.B. 519, provides, in part, that where resolution of the principal issues subject to the restricted consent has a direct or indirect effect on other items, the restricted consent must cover both the principal issue and the consequential changes to other items.

The restrictive language should describe the area(s) of consideration rather than the proposed tax treatment. Each restricted consent must contain a basic restrictive statement and a description of the areas of consideration. Manual Section 4541.72(1) sets forth the restricted consent.

In light of the above, the language for the restricted consent in the instant case should read as follows:

The amount of any deficiency assessment is to be limited to that resulting from any adjustment to the termination of power contracts reported on the Schedule D attached to the [REDACTED] Form 1065, and the sale of the facility reported on the Form 4797 attached to the [REDACTED] Form 1065, including any consequential change to other items based on such adjustments.

As we discussed telephonically, although you submitted a Form 872-0 for completion, it is unlikely the taxpayer would sign an open-ended consent. Therefore, it was agreed that a Form 872-P is the proper form to be used in this instance. It was also further noted that the latest version is Form 872-P (Rev. 10/2000). Enclosed you will find a Draft Form 872-P containing the restrictive language in order to aid you in preparation of the consent.

We are simultaneously submitting this memorandum to the National Office for post-review and any guidance they may deem appropriate. Consequently, you should not take any action based on the advice contained herein during the 10-day review period. We will inform you of any modification or suggestions, and, if necessary, we will send you a supplemental memorandum incorporating any such recommendation.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney-client privilege. If

disclosure becomes necessary, please contact this office for our views.

Since there is no further action required by this office, we will close our file in this matter ten days from the issuance of this memorandum or upon our receipt of written advice from the National Office, whichever occurs later. Please call [REDACTED] at [REDACTED] ext. [REDACTED] if you have any questions or require further assistance.

[REDACTED]  
Associate Area Counsel  
LMSB, Area [REDACTED]

By: [REDACTED]  
Attorney (LMSB)

Enclosure:  
Draft Form 872-P